STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

Versus

Indictment No.
ECDA No.

MEMORANDUM OF LAW FOLLOWING SUPPRESSION HEARING

By:

Erie County District Attorney's Office
25 Delaware Avenue, 6th Floor
Buffalo, New York 14202

PROCEDURAL POSTURE

On [redacted] at approximately 11:15 PM, the defendant's vehicle was stopped and searched by Buffalo Police. Officers found a loaded handgun in the vehicle behind a piece of the dashboard. The only purported basis for the search is that it was an inventory search.

Post-indictment, the defense moved to suppress the handgun and any statements made, and an *Ingle/Mapp* hearing was held on that motion on [redacted]. For the reasons that follow, the handgun must be suppressed, as the officers did not decide to impound the vehicle until after the purported inventory search, the decision to impound a lawfully-parked vehicle was not within the bounds of the inventory policy, the initial search was not an inventory search, and the scope of the search exceeded the permissible bounds of an inventory search. Finally, the officers never testified as to any observations that would even permit a traffic stop.

FACTS

On [redacted] at approximately 11:15, Officers [redacted] and [redacted] were on patrol. They did not testify as to any observations made of the subject vehicle prior to the stop; rather, both merely testified that they were conducting a traffic stop for "speeding and tints" (H 5, H 27). Neither officer testified about what speed the vehicle was traveling, what the speed limit was, or if it was even speeding. Moreover, neither officer testified about the tint level of the vehicle.

The vehicle pulled to the side of this four-lane roadway. The roadway was not marked with any "No Parking" signs, and there was no testimony whatsoever that the vehicle was not pulled into a lawful parking spot (H 15). [redacted] was shown a photograph of the area, which showed that there were no signs to restrict parking (*id.)*.

After stopping the vehicle, officers approached and asked for license and registration. Defendant [redacted] was in the driver's seat, while defendant [redacted] was in the backseat. At this point, the police officers had not decided whether or not to arrest defendant [redacted] for aggravated unlicensed operation and impound his vehicle (H 46). They decided, instead, to conduct a purported inventory search, and decide after that search whether to arrest and impound (*id.*).

Prior to the search, the officers' awareness that there may have been contraband in the vehicle was piqued, as they were familiar with [redacted], the address given by both occupants (H 25). That information made them more aware for two reasons: officer safety and the likelihood that they may find contraband in the vehicle if they searched it (*id.*).

This initial search, now being called by the prosecution an inventory search, was conducted immediately, and prior to any arrest or decision to impound the vehicle. The vehicle was messy, and had a lot of property in it. However, police were searching without any writing utensil, pad, clipboard, or any other way to document the contents of the vehicle. An inventory search with those necessary items was conducted later at the police station.

During this initial, roadside, purported inventory search, the Officer ████ removed a portion of the dashboard (H 20). Behind it, he found a loaded handgun. He testified that he looked in that compartment because offenders often kept contraband in similar inner-cavity portions of vehicles (H 20).

ARGUMENT

POINT ONE

WITHOUT ANY TESTIMONY CONCERNING OBSERVATIONS MADE OF THE SUBJECT VEHICLE BY THE OFFICERS COMMITTING A VEHICLE AND TRAFFIC INFRACTION, THE STOP MUST BE RULED INVALID.

Both officers merely testified that the stop was for "speed and tints" or "speeding and tints" (H 5, H 27). Remarkably, there was no testimony adduced that the officers actually observed the vehicle speeding, what the speed limit was, what the tint level was, or anything else of that nature. Literally zero observations of the vehicle prior to the stop were elicited by the prosecutor or testified to by the officers.

A traffic stop is a seizure of the vehicle and all individuals therein, and accordingly must be predicated upon probable cause of a traffic infraction or reasonable suspicion of criminal activity (*People v Robinson*, 97 NY2d 341, 349 [2001]). The prosecution bears the burden of going forward at an *Ingle* hearing to show that police acted lawfully in stopping a vehicle (*People v Distefano*, 38 NY2d 640, 652 [1976]). Here, the prosecution did not even attempt to meet their burden of going forward, as they elicited exactly zero testimony about any observations made prior to the traffic stop.

It is woefully insufficient for officers to testify that a stop was for "speeding and tints" without any testimony whatsoever about any observations made of the subject vehicle that would warrant such a stop. In every case in which a traffic stop is upheld, courts point to the testimony of the officers that a vehicle and traffic violation occurred (*see eg. People v Miller*, 57 AD3d 568

[2nd Dept 2008] [Stop was upheld where officer testified concerning observations of vehicle traveling at a safe and imprudent speed given the conditions]). It is indeed common sense that the prosecution cannot seek to uphold a stop without any testimony about what the driver did or what the officers observed prior to the stop.

Regarding the tints, a stop for tints will be upheld where an officer "reasonably believes the windows to be overtinted in violation of VTL 375(12-a)(b)" (*People v Biggs*, __ AD3d ___ [2nd Dept 9/28/2022]). Here, there was no testimony whatsoever regarding any observations or beliefs of the officers, or of anyone else for that matter.

Regarding the "speeding," the officers did not testify that they actually observed the defendant speeding prior to the stop.

Pursuant to *People v Ingle* (36 NY2d 413 [1975]), all evidence and observations seized pursuant to this stop must be suppressed, as the People failed to even attempt to establish the basis for same.

POINT TWO

THE INVENTORY SEARCH CANNOT BE JUSTIFIED WHERE THE OFFICERS DID NOT DECIDE TO IMPOUND THE VEHICLE UNTIL AFTER THE SEARCH WAS CONDUCTED AND THE GUN FOUND.

Remarkably, the police unequivocally admitted that they had not decided at the time of the purported inventory search whether they planned on arresting [redacted] or impounding his vehicle. The relevant portion is as follows (Questions by [redacted], attorney for [redacted], answers by Buffalo Police Officer [redacted]):

Q. Okay. So in this situation you determined that my client's license is suspended, correct?

A. Yes.

Q. Which permits you to do an inventory search, correct?

A. Yes.

Q. Okay. After you do that search, if you don't find any contraband, you may or may not in your discretion decide to impound and make an arrest on that 511, correct?

A. Correct.

Q. Okay. And in this case, that decision wasn't made until after you found the gun, correct?

A. The decision? What decision?

Q. The decision to impound the vehicle, make an arrest, things of that nature.

A. I had not made a decision yet. And I hadn't spoken to my partner about it yet.

Q. Okay. So that decision was made for sure after you found the gun, right?

A. Correct.

Q. Okay (H 45-46).

After this exchange, the defense decided not to ask any more questions, and ADA [redacted] chose not to do any re-direct. Thus, the officer's unequivocal and uncontroverted testimony was

that he did not decide whether to impound the vehicle until AFTER the pistol was found during the purported inventory search.

This is fatal to the search for many reasons. First, as a matter of common sense, a vehicle may not be inventoried when it has not yet been decided that it will even be impounded (*see generally People v Galak*, 80 NY2d 715 [1993]). It is of no moment that the officer labeled the search an "inventory search," as the officer's classification is not controlling (*People v Wright*, 285 AD2d 984 [4th Dept 2001]).

Regardless of the officers' motivation, it barely requires stating that an inventory search may only be conducted after a lawful decision to impound has been made. Officer [redacted] candidly testified that he was conducting the search and would decide whether to arrest and impound after the search, depending on what, if anything he found. After finding the gun, the officers decided to arrest the occupants and inventory the vehicle (H 47). This candid and surprising testimony confirms that the search was a generalized search for contraband rather than an inventory search following a decision to impound. One need look no further than the officer's testimony.

However, even without the officer's candid testimony, there would be sufficient evidence that this was a general search for contraband rather than a standardized and proper inventory search (*see People v Johnson*, 1 NY3d 252 [2003]; *People v Elpenord*, 24 AD3d 465 [2nd Dept 2005 [Both standing for the proposition that an inventory search may not be used as a ruse to find contraband]). First, the body cam footage in evidence and officer testimony confirms that this search was conducted without any writing utensils, paper, or any other ability to memorialize the contents of the vehicle, thus confirming the officer's testimony that it was a pre-impound, pre-decision, general search for contraband (H 17). There were many, many items in

the vehicle, and the officers could not possibly have been memorizing what they were (H 18). It was not until much later, after the gun was found and after the vehicle was towed to the stationhouse that an actual inventory search with a pen and a pad was conducted.

Second, the officers can be heard telling Mr. [redacted] on the bodycam footage, in evidence, that their plan was to search the vehicle and if everything checked out, they would be on their way. Although officers are allowed to misrepresent facts or intentions to individuals with whom they are dealing, this statement, before the purported on-scene inventory search, merely confirms Officer [redacted] testimony that they had not yet decided at the time of that search whether to impound the vehicle. Moreover, the officer also candidly admitted that the defendant's address of [redacted] raised suspicion that there may be contraband in the vehicle, as officers had responded to numerous calls at that address (H 15, H 25).

Further, the search was conducted on the side of the road rather than at the stationhouse. This factor, while not dispositive, may reflect the true motivation of an inventory search (*Colorado v Bertine*, 479 US 367 [1987] [Whether the inventory occurs at the location of the stop is a factor in determining the motivation for the search, but is not dispositive]). Here, however, not only was the purported inventory resulting in the recovery of the pistol conducted at the location of the stop, but it was conducted without any writing utensils or any other ability to memorialize the contents, and a later, real inventory search was conducted at the stationhouse, at which time the P-31 form was completed. Combine that with the officer's testimony that he had not yet decided to impound the vehicle until after the gun was recovered, and it is clear that the roadside search was not a proper inventory search. In short, these circumstantial pieces alone may not have been enough to establish that the search was a general search for contraband rather than an actual inventory search. However, they do serve to confirm Officer [redacted] unequivocal and unchallenged testimony that

the search resulting in the finding of the pistol was conducted before any decision to impound was even made.

An inventory search will not be upheld in the absence of evidence demonstrating "that the particular officer conducted the search properly and in compliance with established procedures" (*People v. Johnson,* 1 N.Y.3d at 256, 771 N.Y.S.2d 64, 803 N.E.2d 385; *see People v. Gomez,* 13 N.Y.3d at 11, 884 N.Y.S.2d 339, 912 N.E.2d 555). Here, nothing in the Buffalo Police policy allows officers to conduct a purported inventory search ***before*** deciding whether or not to impound the vehicle. Even if it did, the provision allowing same would be unconstitutional (*see Galak*, 80 NY2d 715 [Impound and inventory policy, to be valid, must be designed to limit the discretion of officers in the field]; *South Dakota v Opperman*, 428 US 364, 368 [1972] [Prerequisite to valid inventory search is a valid impound of the vehicle]).

Inasmuch as the search resulting in the recovery of the pistol was conducted before any decision was made whether to impo

POINT THREE

THE VEHICLE WAS UNLAWFULLY IMPOUNDED, AS THERE WAS NO PROOF THAT IMPOINDMENT WAS NECESSARY; IE THAT THE VEHICLE WAS IMPROPERLY PARKED OR SUBJECT TO DANGER.

Even assuming, *arguendo*, that a decision to impound had been made prior to the search, that decision was unlawful, and the pistol must be suppressed in any event.

Officers testified that when they stopped the vehicle, it pulled to the side of [redacted], near the front of [redacted] (H 14). Officer [redacted] did not recall whether there were any "No Parking" signs or whether parking was prohibited on the road (H 15). When showed a photograph of the area, he confirmed that there were no signs in the photograph that would prohibit parking (H 15).

This is fatal to the impound and inventory search as well. Vehicles may not be routinely impounded incident to a lawful arrest for aggravated unlicensed operation. In invalidating an impound and inventory and suppressing evidence, the Second Department has stated:

> Here, the Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress the physical evidence recovered from his vehicle. The People failed to establish the lawfulness of the impoundment of the defendant's vehicle and subsequent inventory search (*see People v Gomez*, 13 NY3d 6, 11 [2009]; *People v Small*, 156 AD3d 820, 822 [2017]; *People v Leonard*, 119 AD3d 1237, 1238 [2014]). At the suppression hearing, the arresting officer testified that the defendant's vehicle was legally parked at the time of the defendant's arrest, and there was no testimony regarding posted time limits pertaining to the parking space. Further, although the officer testified that he impounded the defendant's vehicle for "safekeeping," the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function (*People v King*, 188 AD3d 721 [2nd Dept 2020]).

King, as well as many other cases, stand for the proposition that where a vehicle is pulled over, pulls into a lawful parking spot, and the driver is arrested, there is no need to impound the vehicle unless the prosecution demonstrates evidence of burglary or vandalism in the area sufficient to require that the vehicle be impounded for safekeeping. Here, the prosecutor did not even attempt to establish that there had been vehicle break-ins, thefts, or vandalisms in the area sufficient to warrant impoundment.

In the unlikely event that *King* leaves any doubt that any decision to impound here was unlawful, please consider *People v Rivera*, 192 AD3d 920 [2nd Dept 2021]. There, the Second Department invalidated an impound and inventory where the defendant's vehicle was stopped and he was ultimately arrested, but where there was no testimony or evidence that the vehicle was not parked lawfully or that there was a history of vandalism or theft to warrant same under the community caretaking function (*see also People v Weeks*, 182 AD3d 539 [2nd Dept 2020] [Evidence suppressed and inventory validated where motorist pulled into lawful parking spot at police precinct upon being stopped, as there was no testimony that the parking spot was unlawful;

claim of community caretaking was rejected because there was no testimony of any history of theft or vandalism in the area]).

Nothing in the Buffalo Police Department policy allows the police to tow a lawfully parked vehicle that is not impeding traffic, even where the driver is arrested for aggravated unlicensed operation or for some other offense. Section 6.3 of the Manual of Procedures, which is in evidence, denotes when a vehicle may be towed. It states:

> A. Damaged, broken down, or illegally parked vehicles may be towed when: 1. the vehicle is obstructing traffic or creating a hazardous traffic condition 2. the vehicle is blocking a driveway; 3. the vehicle is illegally parked in a persons with disability zone; 4. the vehicle has been abandoned or the vehicle has no license plates affixed; 5. the vehicle is obstructing street repairs, snowplowing, or other necessary work in the roadway; it is parked on a snow emergency route during a snow emergency, or towing is necessary to facilitate a special event (e.g. parade, street festival, etc.).

Inasmuch as there was no evidence that this vehicle was damaged, broken down, or illegally parked, this section does not apply and cannot serve to validate the decision to impound the vehicle.

Rule 6.1 states that a vehicle should be towed "whenever it comes under the control of the Buffalo Police Department and it **is necessary to safeguard the vehicle and its contents from damage or theft**; or when the vehicle is evidence or an instrumentality of a crime, **or when a vehicle presents a hazard or inconvenience to the public.** This is in accordance with the above-cited case law. Here, as noted above, there was no attempt on the part of the prosecution to establish either of these purported justifications (*see King, Rivera,* and *Weeks*).

Finally, for completeness sake, Rule 6.3(D) states that a vehicle will be towed to the Auto Pound when:

1. It is not driveable and the owner is unable to make arrangements for immediate private towing
2. The vehicle is unable to be secured and there is a threat that the vehicle may be stolen or further damaged
3. Vehicles shall be towed if they are an integral piece of evidence that needs to be preserved for a successful prosecution of the charges. **Vehicles shall not be routinely towed incident to arrest**
4. Vehicles seized pursuant to VTL 511-b shall be towed
5. Vehicles used in a criminal transaction rendering them eligible for forfeiture shall be towed
6. Vehicles which are parked illegally and are scofflaws shall be towed (Emphasis in original)

None of these conditions are present either. It should be noted that VTL 511-b only authorizes seizure of a vehicle were the operator is arrested for violating aggravated unlicensed operation of a motor vehicle in the first or second degrees, not in the third degree. There was no testimony that this was the case, and the facts testified to would not have permitted an arrest for anything but third degree unlicensed operation (*see People v Miles*, 3 Misc3d 566, fn. 1 [Rochester City Ct 2003] ["Under NY Vehicle and Traffic Law 511-b, the police are required to impound a car where the driver is arrested for aggravated unlicensed operation of a motor vehicle in the second degree pursuant to N.Y. Vehicle and Traffic Law § 511(2). It is undisputed that the driver in this case was arrested for aggravated unlicensed operation of a motor vehicle in the third degree, for which there is no concomitant statutory impoundment obligation. Accordingly, the Court has no occasion to determine whether a car's impoundment pursuant to NY Vehicle and Traffic Law 511-b is constitutional in the absence of probable cause or other indicia demonstrating a constitutionally reasonable basis to do so.

Because there was no evidence adduced at the hearing that the vehicle was unlawfully parked, or that there had been recent thefts or vandalisms in the area, any decision to impound was unlawful. Accordingly, the pistol must be suppressed.

POINT FOUR

THE OFFICER EXCEEDED THE BOUNDS OF A PERMISSIBLE INVENTORY SEARCH BY REMOVING A PORTION OF THE DASH AND SEARCHING THE INTERIOR CAVITY OF THE VEHICLE.

Even if the Court somehow finds that the impound was valid, the search of the cavity of the vehicle behind the dashboard exceeded the scope of a permissible inventory search under the Buffalo Police Department policy. An inventory search must conform to clear and established guidelines that limit officer discretion (*People v Galak*, 80 NY2d 715 [1993]). Where officers exceed the scope permitted by their department, the search is constitutionally infirm (*id.*).

Here, the officers testified that they removed a piece of the dash to search behind, inside the cavity of the vehicle, because they were aware that contraband is sometimes stored within that area of a vehicle (H 20, H 32).

Section 6.7 of the policy, which is in evidence, dictates what may be searched in a towed vehicle as an inventory search. It mandates an inspection of the exterior of the vehicle and "a thorough and complete inventory of the contents of the vehicle, including an inspection of the glove compartment and trunk, if they are unlocked, and the opening and inspection of any unlocked and unsealed containers. Nowhere in the policy does it permit officers to actually take the vehicle apart to look behind the dashboard.

In *People v Morman* (145 AD3d 1435 [4th Dept 2016], the Fourth Department held valid an inventory search where the troopers looked into "open garbage bags," specifically ruling that

the New York State Police policy allowed such a search. Here, the Buffalo Police policy simply did not authorize officers to take the vehicle apart and look behind the dash.

More on point, disassembling parts of the vehicle to search is not permissible within the scope of an inventory search. In *People v Acevedo-Sanchez* (212 AD2d 1023 [4th Dept 1995], the Fourth Department suppressed evidence found during an inventory search where the officer removed the spare tire from the rim to look inside. In so doing, the Court stated "A car owner would have no reasonable expectation that the police would protect property inside a spare tire, and there is minimal risk of a claim that property inside the spare tire of an impounded car is missing" (*id.*). Here, similarly, there was little to no risk of anyone but the police officer seeking incriminating evidence disassembling the defendant's dashboard.

Moreover, 6.7 requires the officer to "complete the Vehicle Inventory form while conducting the inventory, noting the disposition of each item of inventory." This would presumably be to make sure that purported inventory searches are not general rummaging disguised as inventory searches. During the initial search that turned up the pistol, neither officer had the ability to write or document anything at all. The inventory form was done some time later. While some cases uphold this procedure, so long as the form is completed shortly after, in this case the department policy specifically states that it should be done **while** the search is ongoing.

Because the officers violated the department inventory policy in disassembling the vehicle and in searching without contemporaneously documenting the contents, the pistol must be suppressed.

CONCLUSION

The evidence must be suppressed for the following reasons:

1) The prosecutor failed to elicit any observations made by the officers that would warrant a traffic stop, and
2) The decision to impound the vehicle was not yet made at the time of the purported "inventory" search, and
3) The ultimate decision to impound was contrary to case law and the department policy, and
4) The search itself exceeded the scope of a valid inventory search, and was not within the departmental policy.

Yours, etc.